



DOCKET FILE COPY ORIGINAL
Cheryl Lynn Schneider
Chief Regulatory Counsel, Americas

December 16, 1999

BY HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RECEIVED
DEC 16 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: BT North America Inc. Petition for Waiver
In the Matter of Direct Access to the INTELSAT System
Report and Order, IB Docket No.: 98-192 (released Sept. 16, 1999)**

Dear Ms. Salas:

BT North America Inc. hereby files an original and four copies of its Response to Opposition to Petition for Waiver in the above-captioned proceeding.

Please direct questions concerning this Petition to the undersigned at (703) 707-4283.

Respectfully submitted,

Cheryl Lynn Schneider
Chief Regulatory Counsel, Americas
BT North America Inc.

cc: J. Ball, FCC
W. Zeger, Comsat

BT Group Legal Services
Reston Town Center
11911 Freedom Drive, 11th Floor
Reston, VA 20190 USA

Number of Copies rec'd 014
List ABOVE

Before the
Federal Communications Commission
Washington, DC 20554

RECEIVED

DEC 16 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

)

IB Docket No. 98-192

)

File No. 60-SAT-ISP-97

Direct Access to the
INTELSAT System

)

)

BT NORTH AMERICA INC. REPLY TO OPPOSITION
TO PETITION FOR WAIVER

Cheryl Lynn Schneider
Eric H. Loeb
Kristen Neller Verderame

BT North America Inc.
601 Pennsylvania Avenue, NW
North Building, Suite 625
Washington, DC 20004

(202) 639-8222

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY	5
II.	COMSAT FAILED TO REBUT BTNA’S DEMONSTRATION THAT THE UNDERLYING PURPOSE OF THE COMMISSION’S FOREIGN SIGNATORY RESTRICTION WOULD NOT BE SERVED, AND IN FACT WOULD BE FRUSTRATED BY, ITS APPLICATION TO BT AND BTNA	6
III.	COMSAT DID NOT MAKE ANY ATTEMPT TO DEMONSTRATE THAT A WAIVER OF THE COMMISSION’S RESTRICTION WITH RESPECT TO BTNA IS NOT IN THE PUBLIC INTEREST	11
IV.	THE COMMISSION SHOULD DISREGARD COMSAT’S CRITICISM OF BTNA’S REPRESENTATION THAT BT WILL NOT INITIATE OR SUPPORT ANY PROPOSAL TO REDUCE THE IUC TO UNECONOMICALLY LOW LEVELS	12
V.	CONCLUSION	13

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	IB Docket No. 98-192
)	File No. 60-SAT-ISP-97
Direct Access to the)	
INTELSAT System)	

**BT NORTH AMERICA INC. REPLY TO OPPOSITION
TO PETITION FOR WAIVER**

BT North America Inc. ("BTNA") hereby submits its Reply to the Opposition to Petition for Waiver filed by Comsat Corporation ("Comsat") on December 6, 1999.¹ BTNA filed a Petition for Waiver on November 16, 1999 pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3,² asserting that the Commission should grant it a waiver from restrictions imposed in the Direct Access Order³ on foreign Signatories and their greater than fifty percent owned affiliates (collectively "foreign Signatories") when such entities seek direct access to INTELSAT for service between the United States and any foreign country in which the Signatory uses fifty percent or more of all INTELSAT capacity consumed in that country.

¹ *Opposition of Comsat Corporation to BT North America Inc. Petition for Waiver*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 99-236 (Dec. 6, 1999) (hereinafter "*Opposition Comments*").

² *BT North America Inc. Petition for Waiver*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 99-236 (Nov. 16, 1999) (hereinafter "*BTNA Waiver Petition*").

³ *In the Matter of Direct Access to the INTELSAT System*, IB Docket No. 98-192, File No. 60-SAT-ISP-97, FCC 99-236 (released Sept. 16, 1999) (hereinafter "*Direct Access Order*" or "*Order*").

I. INTRODUCTION AND SUMMARY

BTNA demonstrated in its Petition for Waiver that the underlying purpose of the Commission's foreign Signatory restriction will not be served, and in fact will be frustrated, by its application to BT and BTNA. BTNA further demonstrated that the public interest will be served by grant of BTNA's Petition for Waiver. Finally, in order to completely dispel any remaining concerns that the Commission may have, BT represented that it will not initiate or support any proposal to the INTELSAT Board of Governors advocating the reduction of the INTELSAT Utilization Charge ("IUC") to uneconomic levels, unless it is required to do so by other parties in its role as UK Signatory.

In its Opposition Comments, Comsat failed to rebut BTNA's demonstration that the underlying purpose of the Commission's foreign signatory restriction would not be served, and in fact would be frustrated by, its application to BT and BTNA. Moreover, Comsat did not make any attempt to rebut BTNA's demonstration that waiver of the restriction with respect to BTNA would be in the public interest. Finally, Comsat's assertions regarding BTNA's representation not to initiate or support any proposal to reduce the IUC to uneconomically low levels are without merit and should be disregarded. Accordingly, BTNA respectfully requests that the FCC grant BTNA's Petition for Waiver.

II. COMSAT FAILED TO REBUT BTNA'S DEMONSTRATION THAT THE UNDERLYING PURPOSE OF THE COMMISSION'S FOREIGN SIGNATORY RESTRICTION WOULD NOT BE SERVED, AND IN FACT WOULD BE FRUSTRATED BY, ITS APPLICATION TO BT AND BTNA

The purpose of the Commission's restriction on direct access for foreign Signatories is to eliminate any potential incentive for foreign Signatories to depress IUC rates to uneconomically low levels, in order to ensure effective competition in the US direct access market.⁴ BTNA demonstrated in its Petition that the Commission's analysis of assumed economic incentives does not apply to BT, and for this reason, application of the restriction to BTNA does not protect (and indeed harms) effective competition. Therefore, a waiver from the restriction for BTNA is appropriate.⁶

BTNA demonstrated that it not only has no incentive to advocate a lower IUC, but in fact has a strong *disincentive* to do so. BT will gain no competitive advantage in the United States or elsewhere from IUCs that are priced below cost because all INTELSAT users are charged the same IUC rates. Moreover, because BT is an INTELSAT investor, it would suffer lower investment returns due to below-cost IUCs – losses which would be exacerbated by the notable amount by which BT's investment share exceeds its underlying utilization share – placing BT in a disadvantageous position vis-à-vis users that do not invest or whose investment shares do not exceed their utilization shares.⁷

⁴ See *Direct Access Order* at ¶¶ 96-98. Comsat postulates that one of the reasons on which the agency "could" have relied to deny US direct access to foreign Signatories is because it would threaten to derail the privatization of INTELSAT. *Opposition Comments* at n. 5. This point is moot since the Signatories of INTELSAT (Comsat and foreign Signatories) approved the privatization a few months ago.

⁶ See *BTNA Petition for Waiver* at 3-15.

⁷ Comsat argues as a threshold matter that the bulk of BTNA's arguments in its Petition for Waiver are not "appropriate" for a petition for waiver because most of BTNA's arguments are applicable to all Signatories. See *Opposition Comments* at 3. Although the economic incentive analysis by necessity overlaps with the

Comsat struggles unsuccessfully to rebut BT's demonstration that it would not have an incentive, and in fact would have a disincentive, to advocate lower IUC rates. First, although Comsat recognizes that a lower IUC would result in a subsidy from investors to Level 3 users in the United States and elsewhere,⁸ it claims that because the UK market allows only Level 4 direct access, a subsidy would not be similarly provided in BT's home market. This is simply not true. Three of the Level 4 users in the UK would be subsidized because their utilization shares exceed their investment shares significantly.

Specifically, for the 1 March 1999 Determination of Investment Shares, the combined utilization share for Multipoint Communications, Telebermuda International, and Williams Communications Group was 0.204 percent, while their cumulative investment share was only 0.003 percent. Thus, the combined investment share of these three UK competitors of BT covers only 1.6 percent of their combined utilization share. BT would be at a significant competitive disadvantage relative to these three highly subsidized UK competitors if IUCs were lowered below cost. Additionally, BT would also be at a competitive disadvantage vis-à-vis its other 20 Level 4 competitors in the UK. Because their investment shares are equal to their utilization shares, these competitors would not incur an investment loss from below-cost IUCs.

Second, Comsat claims that BT's excess investment share is merely "voluntary," and that therefore BT could easily forego its excess investment share in the future to

economic incentives analysis presented by BTNA in its Petition for Reconsideration, the entirety of the Petition for Waiver is based strictly on BT's particular circumstances as an investor in INTELSAT and competition in the satellite services market in the United States and the UK. Contrary to Comsat's assertion, "the bulk of" the waiver is devoted to factual discussion of the competitive nature of the US and UK markets and the US-UK route.

⁸ *Opposition Comments* at 4.

eliminate the disparity between its investment and utilization shares.⁹ While BT's investment in excess of its utilization share is "voluntary" in the sense that most commercial transactions in a market economy are "voluntary," it would, nonetheless, be costly for BT to give up that investment. BT has found such excess investment to be in its best commercial interests for the last several years. As evidence of the significant commercial advantages BT perceives in holding an excess investment share, BT's investment share in 1999 exceeded its utilization share by 16.9%.

Moreover, in order for BT to find it in its interests to give up its excess investment, it would have to conclude that gains resulting from lowered IUCs would be significant enough to offset BT's opportunity cost from not investing in excess shares. However, as BTNA has demonstrated, there are no potential competitive gains to BT from below-cost IUCs. Below-cost IUCs would not provide a competitive advantage to BT as a Level 3 user in the United States or anywhere else. In summary, there are no plausible competitive or financial reasons deriving from below-cost IUCs for BT to forego an otherwise profitable excess investment share.

Third, Comsat confuses its own arguments when it claims that BT would retain a competitive advantage over "the existing US-international satellite competitors," which it defines to include "COMSAT, PanAmSat and other satellite service providers."¹¹ As a preliminary matter, it should be noted that Comsat's original concern, as expressed in its December 22, 1998 comments, was not with foreign Signatories having direct access in the US. Rather, Comsat's original concern was that the large US international carriers

⁹ *Opposition Comments* at 7-8.

¹¹ *Opposition Comments* at 5-6.

would obtain below-cost prices by influencing foreign Signatories to vote for below-cost prices by compensating, if necessary, the foreign Signatories to cover any investment losses the Signatories might suffer from the below-cost prices. Thus, the argument Comsat is now positing is a new and completely different argument.

Further, Comsat now states that the advantage BT would gain is vis-à-vis existing satellite competitors (“not versus Level 3 users”) and “is precisely the unfair competitive advantage that the Commission recognized, and BTNA does not even attempt to deny that such an unfair advantage would exist...”.¹² This is not the potential competitive advantage that the Commission discussed in its Order, and it would not have made sense for the Commission to have done so. BT and other Signatories would not be competing with existing US international satellite operators. Rather, BT would be competing in the retail market against US carriers, such as AT&T and MCI WorldCom as well as the many other carriers who will undoubtedly seek Level 3 access.¹³ Thus, Comsat’s new theory makes no sense.¹⁴

¹² *Opposition Comments* at 5-6.

¹³ Comsat may be implying that below-cost IUC rates might constitute a type of predatory pricing mechanism on the part of INTELSAT owners to drive independent satellite operators out of business. Predation strategies are generally regarded as highly implausible, especially if targeted against facilities-based operators in the telecommunications industry, such as satellite owners, who have large sunk costs but low marginal costs of operation. Furthermore, if INTELSAT wanted to predate against other satellite operators, it would not need direct access to do so. Moreover, it is difficult to imagine how direct access would enhance INTELSAT’s ability to predate. As a final point, BT is unaware that Comsat has any ownership or lease interest in any satellite system other than INTELSAT. Such a predation strategy, no matter how improbable, would, therefore, not be directed at Comsat.

¹⁴ Because this argument is nonsensical, there was no reason for BTNA to “deny that such an unfair advantage would exist.” Clearly, since BT would not be competing against existing US international satellite operators, there would be no advantage to be gained in the first place. Therefore, there is no advantage to deny.

Finally, even if we were to assume *arguendo* that BT would and could successfully advocate such a lowered IUC,¹⁵ BTNA demonstrated in its Petition for Waiver that the UK and US markets are so competitive that BT would not be able to recoup any of the substantial losses that would be sustained in BT's investment due to the reduced IUCs. Notably, Comsat made no attempt to dispute the extremely competitive nature of the UK market, and the demonstrated fact that the market is so competitive that it would be impossible for BT to charge a mark-up above competitive levels to compensate for the losses it would sustain from its excess investment. As demonstrated above, BT would be at a competitive disadvantage vis-à-vis its many Level 4 competitors in the UK, especially those competitors that would be subsidized by below-cost IUCs.

With respect to the US market, Comsat makes the argument that "BT (and potentially other Level 3 direct access customers) could enjoy windfall gains" from the sale of below-cost space segment because it "might not need to pass through all the cost savings related to direct access and lower IUCs."¹⁶ This argument is without merit and should be disregarded. Under the scenario apparently envisioned by Comsat, BT and other Level 3 users would receive a "windfall" from below-cost IUCs. However, Comsat has presented no scenario to demonstrate that competitive forces would not require BT and the other Level 3 users to pass this "windfall" onto their retail customers. Competitive pressure would undoubtedly force retail prices down to the "windfall" cost level. None of the "windfall" would be retained by the Level 3 users. As BTNA demonstrated in its Petition for Waiver, there would be no opportunity for BT to recoup

¹⁵ As BTNA noted in its Petition for Waiver, even were BT to advocate a lowered IUC at the Board of Governors, it is extremely unlikely that it would be successful. See BTNA Petition for Waiver at n. 10.

¹⁶ *Opposition Comments* at 6-7.

its investment losses in the US market due to the highly competitive nature of that market.

In its Petition for Waiver, BTNA demonstrated not only that BT would have no incentive to seek below-cost IUCs, but that BT would have a strong disincentive to lower IUCs. Although Comsat makes several attempts to rebut these arguments, none of these attempts, as shown above, has any merit. Accordingly, the Commission should disregard Comsat's arguments.

III. COMSAT DID NOT MAKE ANY ATTEMPT TO DEMONSTRATE THAT A WAIVER OF THE COMMISSION'S RESTRICTION WITH RESPECT TO BTNA IS NOT IN THE PUBLIC INTEREST

In its Petition for Waiver, BTNA demonstrated that waiver of the Commission's restriction with respect to BTNA would be in the public interest. As discussed in the Petition for Waiver, BTNA's participation in the US direct access market on the US-UK route would serve the public interest because it would enhance competition and provide US and UK customers with high quality satellite transmission services at lower prices. Through the commonality of language and its extensive international network and broad client base, BTNA's Broadcast Services division is able to transmit a wide range of English-language programming between the United States and the UK. The current restriction would foreclose both US and UK consumers from benefiting from the lower, competitive prices for these services that direct access would allow. BT would be competitively disadvantaged in providing satellite-based services to customers on the US-UK route who would otherwise prefer BT due to its perceived quality of service. Thus,

the public interest would be well-served by allowing BTNA to have direct access to INTELSAT space segment facilities on the US-UK route.

Comsat did not advance a single argument in opposition to BTNA's demonstration that a waiver of the Commission's restriction for BTNA would be in the public interest. Obviously, Comsat cannot deny that BTNA's participation in the US direct access market for the US-UK route is in the public interest.

IV. THE COMMISSION SHOULD DISREGARD COMSAT'S CRITICISM OF BTNA'S REPRESENTATION THAT BT WILL NOT INITIATE OR SUPPORT ANY PROPOSAL TO REDUCE THE IUC TO UNECONOMICALLY LOW LEVELS

BTNA and BT are so certain that a lowering of the IUC to uneconomically low levels would never be in their commercial interests that the parties represented in the Petition for Waiver that they will not initiate or support any proposal to the INTELSAT Board of Governors advocating the reduction of IUC prices to uneconomic levels unless BT is required to do so by other parties (e.g., the UK Government) in its role as UK Signatory. Because the Commission's only stated reason for restricting direct access to foreign Signatories was to foreclose the opportunity for foreign Signatories to depress IUC rates for direct access to uneconomically low levels, BTNA believes that the parties' representation should completely dispel any and all remaining concerns that the Commission may have in that regard.

Comsat's Opposition Comments regarding the parties' representation are without merit and should be disregarded. First, Comsat questions how the representation would be enforced.¹⁷ BTNA is confident that Comsat, being represented at all Board of

¹⁷ *Opposition Comments* at 8.

Governors meetings by several employees, would be the first to notify the Commission should BT violate this representation. Moreover, US Government representatives are present at all Board of Governors meetings, and they would also be in a position to notify the Commission immediately should BT violate its commitment in this regard.

Second, Comsat claims that the parties' pledge does not cover the situation in which INTELSAT's costs rise but IUCs do not rise to reflect these cost increases. By not voting to raise the IUC, BT would be in effect supporting the adoption of below-cost IUCs.¹⁸ BT and BTNA are happy to explicitly extend their commitment to cover such situations. The spirit and intent of BT and BTNA's representation is to cover all situations in which BT could potentially be in a position to vote in a manner that would establish IUC rates at uneconomically low levels.¹⁹

V. CONCLUSION

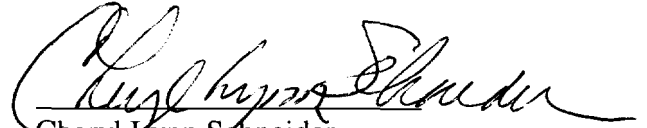
Based on the demonstrations made in BTNA's Petition for Waiver, and Comsat's failure to rebut any of these demonstrations in its Opposition Comments, BTNA respectfully requests that the FCC grant a waiver to BTNA with respect to the restrictions imposed in the *Direct Access Order* on foreign Signatories and their greater than fifty percent owned affiliates, thereby allowing BTNA to purchase direct access in the United States for service on the US-UK route.

¹⁸ *Id.*

¹⁹ As noted in the Petition for Waiver, the Commission defines "uneconomically low levels" to be "levels that do not reflect INTELSAT's full costs of providing direct access in the US market." See BTNA Petition for Waiver at n. 44; *Direct Access Order* at ¶ 96.

Respectfully submitted,

BT NORTH AMERICA INC.

A handwritten signature in cursive script, appearing to read "Cheryl Lynn Schneider", written over a horizontal line.

Cheryl Lynn Schneider

Eric H. Loeb

Kristen Neller Verderame

BT North America Inc.

601 Pennsylvania Avenue, NW

North Building, Suite 625

Washington, DC 20004

Dated: December 16, 1999